

LEGISLATURE OF NEBRASKA

ONE HUNDRED FIRST LEGISLATURE

SECOND SESSION

LEGISLATIVE BILL 901

FINAL READING

Introduced by Wightman, 36; Conrad, 46; Flood, 19.

Read first time January 12, 2010

Committee: Judiciary

A BILL

1 FOR AN ACT relating to child custody; to amend sections 43-2923
2 and 43-2937, Reissue Revised Statutes of Nebraska, and
3 section 42-364, Revised Statutes Supplement, 2009; to
4 change best interests of the child requirements; to
5 provide for waiver of mandatory mediation as prescribed;
6 to provide an operative date; to repeal the original
7 sections; and to declare an emergency.
8 Be it enacted by the people of the State of Nebraska,

1 Section 1. Section 42-364, Revised Statutes Supplement,
2 2009, is amended to read:

3 42-364 ~~(1)~~ (1)(a) In an action under Chapter 42 involving
4 child support, child custody, parenting time, visitation, or other
5 access, the parties and their counsel, if represented, shall
6 develop a parenting plan as provided in the Parenting Act. If
7 the parties and counsel do not develop a parenting plan, the
8 complaint shall so indicate as provided in section 42-353 and
9 before July 1, 2010, the case may be referred to mediation,
10 specialized alternative dispute resolution, or other alternative
11 dispute resolution process and on or after such date the case
12 shall be referred to mediation or specialized alternative dispute
13 resolution as provided in the Parenting Act. For good cause shown
14 and (i) when both parents agree and such parental agreement is
15 bona fide and not asserted to avoid the purposes of the Parenting
16 Act, or (ii) when mediation or specialized alternative dispute
17 resolution is not possible without undue delay or hardship to
18 either parent, the mediation or specialized alternative dispute
19 resolution requirement may be waived by the court. In such a case
20 where waiver of the mediation or specialized alternative dispute
21 resolution is sought, the court shall hold an evidentiary hearing
22 and the burden of proof for the party or parties seeking waiver is
23 by clear and convincing evidence.

24 (b) The decree in an action involving the custody of
25 a minor child shall include the determination of legal custody

1 and physical custody based upon the best interests of the
2 child, as defined in the Parenting Act, and child support. Such
3 determinations shall be made by incorporation into the decree of
4 ~~(a)~~ (i) a parenting plan developed by the parties, if approved by
5 the court, or ~~(b)~~ (ii) a parenting plan developed by the court
6 based upon evidence produced after a hearing in open court if no
7 parenting plan is developed by the parties or the plan developed by
8 the parties is not approved by the court. The decree shall conform
9 to the Parenting Act.

10 (c) The social security number of each parent and the
11 minor child shall be furnished to the clerk of the district court
12 but shall not be disclosed or considered a public record.

13 (2) In determining legal custody or physical custody,
14 the court shall not give preference to either parent based on the
15 sex of the parent and, except as provided in section 43-2933, no
16 presumption shall exist that either parent is more fit or suitable
17 than the other. Custody shall be determined on the basis of the
18 best interests of the child, as defined in the Parenting Act.
19 Unless parental rights are terminated, both parents shall continue
20 to have the rights stated in section 42-381.

21 (3) Custody of a minor child may be placed with both
22 parents on a joint legal custody or joint physical custody basis,
23 or both, (a) when both parents agree to such an arrangement in the
24 parenting plan and the court determines that such an arrangement is
25 in the best interests of the child or (b) if the court specifically

1 finds, after a hearing in open court, that joint physical custody
2 or joint legal custody, or both, is in the best interests of the
3 minor child regardless of any parental agreement or consent.

4 (4) In determining the amount of child support to be
5 paid by a parent, the court shall consider the earning capacity
6 of each parent and the guidelines provided by the Supreme Court
7 pursuant to section 42-364.16 for the establishment of child
8 support obligations. Upon application, hearing, and presentation of
9 evidence of an abusive disregard of the use of child support money
10 or cash medical support paid by one party to the other, the court
11 may require the party receiving such payment to file a verified
12 report with the court, as often as the court requires, stating
13 the manner in which child support money or cash medical support
14 is used. Child support money or cash medical support paid to the
15 party having custody of the minor child shall be the property of
16 such party except as provided in section 43-512.07. The clerk of
17 the district court shall maintain a record, separate from all other
18 judgment dockets, of all decrees and orders in which the payment
19 of child support, cash medical support, or spousal support has
20 been ordered, whether ordered by a district court, county court,
21 separate juvenile court, or county court sitting as a juvenile
22 court. Orders for child support or cash medical support in cases
23 in which a party has applied for services under Title IV-D of
24 the federal Social Security Act, as amended, shall be reviewed as
25 provided in sections 43-512.12 to 43-512.18.

1 (5) Whenever termination of parental rights is placed in
2 issue:

3 (a) The court shall transfer jurisdiction to a juvenile
4 court established pursuant to the Nebraska Juvenile Code unless
5 a showing is made that the county court or district court
6 is a more appropriate forum. In making such determination, the
7 court may consider such factors as cost to the parties, undue
8 delay, congestion of dockets, and relative resources available for
9 investigative and supervisory assistance. A determination that the
10 county court or district court is a more appropriate forum shall
11 not be a final order for the purpose of enabling an appeal. If
12 no such transfer is made, the court shall appoint an attorney as
13 guardian ad litem to protect the interests of any minor child.
14 The court may terminate the parental rights of one or both parents
15 after notice and hearing when the court finds such action to be in
16 the best interests of the minor child, as defined in the Parenting
17 Act, and it appears by the evidence that one or more of the grounds
18 for termination of parental rights stated in section 43-292 exist;
19 and

20 (b) The court shall inform a parent who does not have
21 legal counsel of the parent's right to retain counsel and of
22 the parent's right to retain legal counsel at county expense if
23 such parent is unable to afford legal counsel. If such parent
24 is unable to afford legal counsel and requests the court to
25 appoint legal counsel, the court shall immediately appoint an

1 attorney to represent the parent in the termination proceedings.
2 The court shall order the county to pay the attorney's fees and
3 all reasonable expenses incurred by the attorney in protecting the
4 rights of the parent. At such hearing, the guardian ad litem shall
5 take all action necessary to protect the interests of the minor
6 child. The court shall fix the fees and expenses of the guardian ad
7 litem and tax the same as costs but may order the county to pay on
8 finding the responsible party indigent and unable to pay.

9 (6) Modification proceedings relating to support,
10 custody, parenting time, visitation, other access, or removal of
11 children from the jurisdiction of the court shall be commenced
12 by filing a complaint to modify. Modification of a parenting
13 plan is governed by the Parenting Act. Proceedings to modify a
14 parenting plan shall be commenced by filing a complaint to modify.
15 Such actions may be referred to mediation, specialized alternative
16 dispute resolution, or other alternative dispute resolution process
17 before July 1, 2010, and on and after such date shall be referred
18 to mediation or specialized alternative dispute resolution as
19 provided in the Parenting Act. For good cause shown and (a) when
20 both parents agree and such parental agreement is bona fide and
21 not asserted to avoid the purposes of the Parenting Act, or (b)
22 when mediation or specialized alternative dispute resolution is not
23 possible without undue delay or hardship to either parent, the
24 mediation or specialized alternative dispute resolution requirement
25 may be waived by the court. In such a case where waiver of the

1 mediation or specialized alternative dispute resolution is sought,
2 the court shall hold an evidentiary hearing and the burden of proof
3 for the party or parties seeking waiver is by clear and convincing
4 evidence. Service of process and other procedure shall comply with
5 the requirements for a dissolution action.

6 (7) In any proceeding under this section relating to
7 custody of a child of school age, certified copies of school
8 records relating to attendance and academic progress of such child
9 are admissible in evidence.

10 Sec. 2. Section 43-2923, Reissue Revised Statutes of
11 Nebraska, is amended to read:

12 43-2923 The best interests of the child require:

13 (1) A parenting arrangement and parenting plan or other
14 court-ordered arrangement which provides for a child's safety,
15 emotional growth, health, stability, and physical care and regular
16 and continuous school attendance and progress for school-age
17 children;

18 (2) When a preponderance of the evidence indicates
19 domestic intimate partner abuse, a parenting and visitation
20 arrangement that provides for the safety of a victim parent;

21 (3) That the child's families and those serving in
22 parenting roles remain appropriately active and involved in
23 parenting with safe, appropriate, continuing quality contact
24 between children and their families when they have shown the
25 ability to act in the best interests of the child and have shared

1 in the responsibilities of raising the child;

2 (4) That even when parents have voluntarily negotiated
3 or mutually mediated and agreed upon a parenting plan, the court
4 shall determine whether it is in the best interests of the child
5 for parents to maintain continued communications with each other
6 and to make joint decisions in performing parenting functions as
7 are necessary for the care and healthy development of the child. If
8 the court rejects a parenting plan, the court shall provide written
9 findings as to why the parenting plan is not in the best interests
10 of the child; ~~and~~

11 (5) That certain principles provide a basis upon which
12 education of parents is delivered and upon which negotiation and
13 mediation of parenting plans are conducted. Such principles shall
14 include: To minimize the potentially negative impact of parental
15 conflict on children; to provide parents the tools they need to
16 reach parenting decisions that are in the best interests of a
17 child; to provide alternative dispute resolution or specialized
18 alternative dispute resolution options that are less adversarial
19 for the child and the family; to ensure that the child's voice
20 is heard and considered in parenting decisions; to maximize the
21 safety of family members through the justice process; and, in
22 cases of domestic intimate partner abuse or child abuse or neglect,
23 to incorporate the principles of victim safety and sensitivity,
24 offender accountability, and community safety in parenting plan
25 decisions; and.

1 (6) In determining custody and parenting arrangements,
2 the court shall consider the best interests of the minor child,
3 which shall include, but not be limited to, consideration of the
4 foregoing factors and:

5 (a) The relationship of the minor child to each parent
6 prior to the commencement of the action or any subsequent hearing;

7 (b) The desires and wishes of the minor child, if of an
8 age of comprehension but regardless of chronological age, when such
9 desires and wishes are based on sound reasoning;

10 (c) The general health, welfare, and social behavior of
11 the minor child;

12 (d) Credible evidence of abuse inflicted on any family
13 or household member. For purposes of this subdivision, abuse and
14 family or household member shall have the meanings prescribed in
15 section 42-903; and

16 (e) Credible evidence of child abuse or neglect or
17 domestic intimate partner abuse. For purposes of this subdivision,
18 the definitions in section 43-2922 shall be used.

19 Sec. 3. Section 43-2937, Reissue Revised Statutes of
20 Nebraska, is amended to read:

21 43-2937 (1) In addition to those cases that are
22 mandatorily referred to mediation or specialized alternative
23 dispute resolution under subsection (3) of this section, a court
24 may, at any time in the proceedings upon its own motion or upon the
25 motion of either party, refer a case to mediation or specialized

1 alternative dispute resolution in order to attempt resolution of
2 any relevant matter. The court may state a date for the case to
3 return to court, and the court shall not grant an extension of such
4 date except for cause. If the court refers a case to mediation
5 or specialized alternative dispute resolution, the court may, if
6 appropriate, order temporary relief, including necessary support
7 and provision for payment of mediation costs. Court referral
8 shall be to a mediator agreed to by the parties and approved by
9 the court, an approved mediation center, or a court conciliation
10 program. The State Court Administrator's office shall develop a
11 process to approve mediators under the Parenting Act.

12 (2) Prior to July 1, 2010, if there are allegations of
13 domestic intimate partner abuse or unresolved parental conflict
14 between the parties in any proceeding, mediation shall not be
15 required pursuant to the Parenting Act or by local court rule,
16 unless the court has established a specialized alternative dispute
17 resolution rule approved by the State Court Administrator. The
18 specialized alternative dispute resolution process shall include
19 a method for court consideration of precluding or disqualifying
20 parties from participating; provide an opportunity to educate both
21 parties about the process; require informed consent from both
22 parties in order to proceed; provide safety protocols, including
23 separate individual sessions for each participant, informing each
24 party about the process, and obtaining informed consent from
25 each party to continue the process; allow support persons to

1 attend sessions; and establish opt-out-for-cause provisions. On and
2 after July 1, 2010, all trial courts shall have a mediation and
3 specialized alternative dispute resolution rule in accordance with
4 the act.

5 (3) ~~For~~ Except as provided in subsection (4) of this
6 section, for cases filed on or after July 1, 2010, all parties who
7 have not submitted a parenting plan to the court within the time
8 specified by the court shall be ordered to participate in mediation
9 or specialized alternative dispute resolution with a mediator, a
10 court conciliation program, or an approved mediation center as
11 provided in section 43-2939.

12 (4) For good cause shown and (a) when both parents agree
13 and such parental agreement is bona fide and not asserted to
14 avoid the purposes of the Parenting Act, or (b) when mediation
15 or specialized alternative dispute resolution is not possible
16 without undue delay or hardship to either parent, the mediation
17 or specialized alternative dispute resolution requirement may be
18 waived by the court. In such a case where waiver of the mediation
19 or specialized alternative dispute resolution is sought, the court
20 shall hold an evidentiary hearing and the burden of proof for
21 the party or parties seeking waiver is by clear and convincing
22 evidence.

23 Sec. 4. This act becomes operative on July 1, 2010.

24 Sec. 5. Original sections 43-2923 and 43-2937, Reissue
25 Revised Statutes of Nebraska, and section 42-364, Revised Statutes

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1 Supplement, 2009, are repealed.

2 Sec. 6. Since an emergency exists, this act takes effect

3 when passed and approved according to law.